In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No.

CITY AND COUNTY OF SAN FRANCISCO (a municipal corporation), *Petitioner,*

vs.

DAN E. WILLIAMS and LYDIA C. WILLIAMS (his wife), DOMINGO DE BERNARDI, FRED DE BERNARDI, JOHN F. MUNN and MARY C. MUNN (his wife), THE OLIVER-HARRIMAN MINING COMPANY, LTD. (a corporation), CLYDE PENROSE and IRENE S. PENROSE (his wife), LOUIS HARRIS, MARY L. MILLS, formerly M. L. Maxwell, HELEN C. STRATTON, PETER M. SHAW, RAY HOUSTON, NORMAN HOUSTON, HELEN M. STEWART and D. M. STEWART, JR. (husband and wife), LOVINA C. MARCONI, EVERIL G. POORMAN, formerly Everil G. Marconi, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The jurisdiction of this Court is invoked under subdivision (b) of Section 237 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat.

937 [28 U.S.C.A. §344]), and under subdivision 5(a) of Rule 38 of this Court.

The judgment of the trial Court, the Superior Court of the State of California in and for the County of Merced, was entered May 16, 1941.

The opinion of the District Court of Appeal, First Appellate District, Division One, of the State of California, was rendered and filed December 28, 1942. It is reported in the official advance sheets, 56 A.C.A. 421, and in 133 P.(2d) 70. (R. 126.)

A petition by defendant and appellant (this petitioner) for a hearing by the Supreme Court of California, after judgment by said First District Court, was denied on February 25, 1943. (R. 132.)

The request that the petition herein be directed to the First District Court is in accord with the practice approved in

Chicago & Eastern I. R. Co. v. Industrial Commission, 284 U. S. 296, 298, 76 L. Ed. 304, 305.

JURISDICTION.

This case presents the single federal question of the interpretation of the opinion of this Court in the *Cal. Ore. Power* case, 295 U. S. 142, 79 L. ed. 1356, which interprets a reservation of water contained in the Desert Land Act of March 3, 1877, C. 107, § 1, 19 Stat. 377 (43 U.S.C.A. § 321.)

STATEMENT OF FACTS.

We have set forth in the petition herein a summary of the case which we believe sufficient for present purposes. We have appended hereto, as Exhibit "A", a table showing the date of location or entry of each parcel of land, involved in this case, as found by the trial Court. The table clearly shows that each of such parcels was located or entered subsequent to March 3, 1877.

The opinion of the First District Court contains a correct statement of the facts with the following exception: Through inadvertence it says (referring to the answer of defendant): "It then denies that it has wrongfully diverted or intends to divert any of the waters of the Tuolumne River necessary for beneficial purposes on the lands of the plaintiffs." The quoted sentence has reference to paragraph VII of the fourth defense of the amended answer. (R. 48.) That paragraph was stricken from the answer by leave of the trial Court. (Amendment No. 25, R. 75.)

THE DESERT LAND ACT.

The part of the Desert Land Act of March 3, 1877 (43 U.S.C.A. §321) with which we are concerned herein is as follows:

> "PROVIDED, HOWEVER, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres *shall depend upon bona fide prior appropriation;* and such right shall not exceed the amount of water actually appropriated,

and necessarily used for the purpose of irrigation and reclamation; *and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.*"

SPECIFICATION OF ERROR.

The *single* specification of error involved in this case is the failure of the First District Court to follow the interpretation of the reservation of water contained in the Desert Land Act as given by this Court in the *Cal. Ore. Power* case.

Although it was held in this case that each parcel of land of plaintiffs (respondents herein) was entered or located subsequent to March 3, 1877, it was nevertheless held that each of such parcels possesses riparian rights. The judgment, therefore, flies in the face of the ruling of this Court in the *Cal. Ore. Power* case, which is that no riparian rights pass with patents issued after March 3, 1877, under any of the land laws of the United States.

The failure is due primarily to the misconstruction by the First District Court of the opinion of this Court in the following three particulars:

1. The outstanding error of the First District Court is its ruling that the expression: "such title,

and only such title, to the flowing waters therein as shall be fixed or acknowledged by the customs, laws and judicial decisions of the state of their location", used in the opinion of this Court in the *Cal. Ore. Power* case (295 U. S. p. 162), includes *riparian rights.* Such interpretation would nullify the decision of this Court in the *Cal. Ore. Power* case, as under it plaintiff in that case would have riparian rights.

2. A second error of the First District Court in its misinterpretation of the opinion of this Court in the *Cal. Ore. Power* case is its construction of part *"Second"* of the opinion of this Court. (295 U. S. pp. 163-166.) The First District Court holds that the first two sentences of said part "Second" gives to each state the right to determine the doctrine of water rights to be followed therein, and for that reason there can be no reservation of water under the Desert Land Act in California. This erroneous theory is likewise in opposition to the direct decision of this Court in the *Cal. Ore. Power* case, and is inconsistent with a settled rule of property in California.

Lux v. Haggin, 69 Cal. 255, 368, 10 P. 674, 739.

3. A third error of the First District Court leading to its misinterpretation of the opinion of this Court in the *Cal. Ore. Power* case is its statement: "It would seem to be quite immaterial, therefore, so far as this case is concerned, what laws or legal doctrines have been followed in the State of Oregon". The whole opinion of this Court in the *Cal. Ore. Power* case rests upon its acceptance of the fact that the doctrine of riparian rights *does obtain in Oregon.*

ARGUMENT.

I.

THE QUESTION PRESENTED HEREIN IS EXCLUSIVELY A FEDERAL QUESTION—THE INTERPRETATION OF THE CONGRESSIONAL DESERT LAND ACT OF MARCH 3, 1877.

The single question here is the construction of a decision (the *Cal. Ore. Power* case, 295 U. S. 142, 79 L. ed. 1356) by this Court interpreting a congressional statute—the Desert Land Act of March 3, 1877.

The construction of grants of the United States is a *Federal not a state question.* The states are powerless to place any limitation or restriction on the control by the United States of the disposition of its lands.

> *United States v. Oregon,* 295 U. S. 1, 27, 79 L. ed. 1267, 1280.

This federal question was presented to the trial Court in this case by Amendment No. 1 of the amendments to amended answer which is as follows:

> "By inserting as part of paragraph II and at the end thereof in line 11, page 2, the following:
>
> 'In this respect defendant alleges that each of the tracts of land, excepting only the Clio Mill Site, alleged to be owned by a plaintiff herein, was entered or located subsequent to March 3, 1877; that the riparian rights which were part and parcel of each of said tracts when part of the public domain were reserved by the United States; and that no one of said tracts has possessed any riparian right to the use of water since it was severed from the public domain.' "
> (R. 69, 70.)

The main question discussed in the opinion of the First District Court is the interpretation of the Desert Land Act by this Court in the *Cal. Ore. Power* case.

II.

A CONVEYANCE OF LAND, PHYSICALLY RIPARIAN TO A STREAM, CARRIES THE COMMON-LAW RIPARIAN RIGHT TO USE THE WATERS THEREOF UNLESS (1) THE RIGHT HAS BEEN RESERVED BY THE GRANTOR, OR (2) THE RIGHT HAS BEEN ABROGATED IN THE STATE OF ITS LOCATION. IN THE CAL. ORE. POWER CASE (295 U. S. 142, 79 L. ed. 1356), THE LOWER COURT HELD THAT THE HOMESTEAD PATENT OF 1885 ISSUED TO PLAINTIFF CARRIED WITH IT RIPARIAN RIGHTS, BUT THAT SUCH RIGHTS HAD BEEN ABROGATED BY THE 1909 OREGON WATER CODE. THIS COURT, HOWEVER, HELD THAT UNDER THE PROVISIONS OF THE DESERT LAND ACT NO LAND PATENTED THEREAFTER POSSESSES RIPARIAN RIGHTS.

In the *Cal. Ore. Power* case, both the lower Court and this Court held that plaintiff had no riparian rights, so far as the use of water is concerned, but the two Courts rested upon grounds radically different. The lower Court held that the homestead patent of 1885 issued to plaintiff carried riparian rights, but that such rights were abrogated by the 1909 Oregon Water Code. This Court *refused to pass upon the validity of the 1909 Water Code,* but held that due to the reservation in the Desert Land Act plaintiff's land had no riparian rights as the land had been patented after March 3, 1877, the date of the Desert Land Act.

As much of the confusion* in the First District Court's opinion herein was caused by its failure to distinguish between the paths followed by the two federal Courts, we proceed to discuss the two decisions.

A. The decision of the Circuit Court of Appeals in the Cal. Ore. Power case, 73 F. (2d) 555.

In the *Cal. Ore. Power* case before the lower Court (73 F. (2d) 555) the plaintiff contended that by the rule of the common law a riparian owner has a vested right to the "continuous flow" of the natural stream, that this rule was part of the law of Oregon when plaintiff's lands were acquired from the Government in 1885, and that the vested property right thus created is protected as against changes in the Oregon law by the Federal Constitution. Defendants claimed superior rights as appropriators under the Oregon Water Code of 1909. The claims of defendants were upheld by a divided Court—Judge Wilbur dissenting. The Oregon case, *Hough v. Porter,* 51 Or. 318, 98 P. 1083, was considered (pp. 559-562), but the Court in refusing to follow it said (73 F. (2d) 562):

> "We conclude that the Desert Act of 1877 did not require the state of Oregon to abandon the rule of 'continuous flow' as to all riparian lands in that state settled on and patented after its enactment."

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*In its opinion in 24 Cal. App. (2d) 630, 636, the Third District Court was so confused on this point that it said this Court *sustained the validity* of the Oregon Water Code. In the present opinion, the First District Court, in adopting the opinion of the Third District Court, fails to note this *glaring error.*

Regarding the Oregon case, *In re Hood River,* which construed the 1909 Water Code, it is said in the main opinion (p. 560):

> "These and related provisions of the Code were definitely construed in *In Re Water Rights of Hood River,* 114 Or. 112, 227 P. 1065, 1079 (1924), to abolish the rule of continuous flow contended for by the plaintiff in the instant case."

After stating (p. 562) that riparian rights, like other property, are subject to the police power of the state, the Court proceeded to examine at length cases in other western states wherein the common-law rule of riparian rights was first adopted and then wholly or partly abandoned, and concluded as follows (p. 569):

> "We conclude, then, that the riparian owner's right to the natural flow of the stream substantially undiminished has been validly abrogated by the Water Code of 1909 as construed by the Oregon court. Plaintiff's assertion of such a right in this case cannot, therefore, be sustained."

Judge Wilbur concurred in that portion of the main opinion construing the Desert Land Act (p. 569), but in dissenting from other portions held (p. 576):

> "So construed, the Water Act by its own force destroyed all riparian rights which had not been beneficially used, solely because of such nonuse, and this without giving any opportunity to exercise the right after the enactment of the law. *So construed in its application to the rights of appellant it is a clear violation of the Fourteenth Amendment to the Constitution.*"

There is, therefore, no question but that all three federal judges believed that the doctrine of riparian rights was the paramount doctrine in Oregon prior to the adoption of the 1909 Water Code. The prevailing opinion held that the Code was a proper exercise of the police power in subordinating riparian rights to appropriations. Dissenting, Judge Wilbur held that such a construction is a clear violation of the Fourteenth Amendment and that the doctrine of riparian rights is still paramount in Oregon regardless of the Code.

On writ of certiorari to this Court the federal question of violation of the Fourteenth Amendment was squarely presented to it.

B. The decision of this Court in the Cal. Ore. Power Case, 295 U. S. 142.

In the opening part of its opinion this Court thus summarized the decision of the lower Court (p. 153):

> "The court held: (1) *That the homestead patent of 1885 carried with it the common-law right* to have the stream continue to flow in its accustomed channel, without substantial diminution; but (2) that, while this was a substantial property right which could not be arbitrarily destroyed, it nevertheless was subject to the police power of the state and might be modified by legislation passed in the interest of the general welfare; and upon the latter ground the Water Code was upheld and the claims of respondents sustained."

This Court then proceeded with its main opinion, which it called, "First". The opening lines of the first sentence are:

> *"The first question is of especial importance to the semiarid states of California, Oregon, and Washington* * * *"

It is particularly noteworthy that this Court recognized that it was dealing with a question of importance to many states, and not simply to the one state wherein the case had arisen. As the opinion proceeds constant reference is made to conditions and cases in California, as if the case before this Court was from this state.

The second paragraph of part "A" of the opinion is in part as follows:

> *"The question with which we are here primarily concerned* is whether * * * the homestead patent in question carried with it as part of the granted estate the common-law rights which attach to riparian proprietorship. If the answer be in the negative, *it will be unnecessary to consider the second question decided by the court below."*

We direct particular attention to the concluding sentence of the above excerpt. As the answer was *in the negative* it was unnecessary for this Court "to consider the second question decided by the court below". This is conclusively shown by the final paragraph of the opinion, as follows (p. 165):

> "For the foregoing reasons, we affirm the decree of the court below, passing without considera-

> tion the second question discussed by that court and upon which its decisions rested, *as to which we express no opinion."*

It is abundantly clear, therefore, that this Court did *not* uphold the validity of the Oregon Water Code in subordinating riparian rights to appropriation. *It refused to express any opinion on that point.* For its purposes it considered the riparian doctrine *still in force* in Oregon, but held that under the provisions of the Desert Land Act the homestead patent in question (that of 1885 under which petitioner claimed) did *not* carry with it as part of the granted estate the common-law rights which attach to riparian proprietorship. That was the question with which this Court *"was primarily concerned"*. (pp. 153, 154.)

III.

THE FIRST DISTRICT COURT IGNORES THE FACTS (1) THAT THE CALIFORNIA SUPREME COURT HAD INTERPRETED THE PROVISIONS OF THE DESERT LAND ACT IN SAN JOAQUIN ETC. CO. v. WORSWICK, 187 CAL. 674, 690, 203 PAC. 999, AND (2) THAT THIS COURT IN THE CAL. ORE. POWER CASE DIRECTLY POINTS THE ERROR OF THE COURT IN THE WORSWICK CASE. AS THE QUESTION INVOLVED IS EXCLUSIVELY FEDERAL (THE CONSTRUCTION OF A CONGRESSIONAL STATUTE), THE STATE COURTS MUST ACCEPT THE RULING OF THIS COURT.

In its opinion in the *Cal. Ore. Power* case, this Court, at pages 160, 162, comments upon the decisions of State Supreme Courts interpreting the Desert Land Act. The Supreme Courts of Oregon and South

Dakota reached "the right conclusion", but the Supreme Courts of Washington and California failed to do so. Regarding the decisions in the last two states, this Court said (pp. 161, 162):

> "The Supreme Court of Washington in *Still v. Palouse Irr. & Power Co.*, 64 Wash. 606, 612, 117 P. 466, gave a more limited construction to the Desert Land Act, holding that thereby Congress recognized and assented to the appropriation of water in contravention to the common-law right of the riparian owner only in respect of desert lands granted under the act. See, also, *Bernot v. Morrison,* 81 Wash. 538, 559, 560, 143 P. 104, Ann. Cas. 1916D, 290.
>
> In *San Joaquin & Kings River Canal & Irrigation Co. v. Worswick,* 187 Cal. 674, 690, 203 P. 999, the Supreme Court of California followed the Washington Court in holding that the language of the Desert Land Acts applied only to desert land entries.
>
> *To accept the view of the Washington and California courts would, in large measure, be to subvert the policy which Congress had in mind; namely, to further the disposition and settlement of the public domain."*

It is noteworthy that the Court in *San Joaquin, etc. v. Worswick,* 187 Cal. 674, 690, did not rely upon any of the reasons set forth in the opinion of the First District Court. It held that the Act had reference to *desert land entries only,* and that as the lands of defendants in that case were not such lands their riparian rights were not affected by the Act. But this Court now holds (p. 158):

> "From that premise, it follows that a patent issued thereafter for lands in a desert land state or territory, *under any of the land laws of the United States,* carried with it, of its own force, no common-law right to the water flowing through or bordering upon the lands conveyed."

It should require no argument to show that a state Court must follow this Court on a strictly federal question like the one here—the interpretation of a congressional statute. Nevertheless, we quote the rule as given in *Albert Pick & Co. v. Jordan,* 169 Cal. 1, 4, 145 P. 506, to show that the California Supreme Court has been cognizant of this accepted rule:

> "In *Mulford Co. v. Curry* this court expressed the reluctance it felt over the necessity of applying the principles of the *Western Union Telegraph Co. v. Kansas* and the other like cases to the fiscal and revenue laws of the state. It did so under the compulsion of its oath to uphold the Constitution and laws of the United States as expounded by its highest judicial tribunal. *If we were in error in our understanding of the law,* if the Supreme Court of the United States has latterly thrown new light upon its own exposition of the law or if it has receded from any of the views which it has expressed in the earlier cases, *it is for this court to remodel its own decisions in swift conformity therewith.*"

IV.

THE FIRST DISTRICT COURT IS IN ERROR IN HOLDING THAT THE EXPRESSION, "WATER RIGHTS RECOGNIZED AND ACKNOWLEDGED BY THE LOCAL CUSTOMS, LAWS AND THE DECISIONS OF THE COURTS", REFERS TO RIPARIAN RIGHTS. THAT EXPRESSION WAS USED IN THE CONGRESSIONAL ACT OF 1866 AND LATER ACTS TO DESIGNATE APPROPRIATIVE RIGHTS EXCLUSIVELY.

FURTHERMORE, THERE IS NO SUCH EXPRESSION IN THE DESERT LAND ACT. THE RESERVATION OF WATER IN THAT ACT PROVIDES THAT "ALL SURPLUS WATER OVER AND ABOVE SUCH ACTUAL APPROPRIATION AND USE, TOGETHER WITH THE WATER OF ALL LAKES, RIVERS, AND OTHER SOURCES OF WATER SUPPLY UPON THE PUBLIC LANDS AND NOT NAVIGABLE, SHALL REMAIN AND BE HELD FREE FOR THE APPROPRIATION AND USE OF THE PUBLIC FOR IRRIGATION, MINING AND MANUFACTURING PURPOSES SUBJECT TO EXISTING RIGHTS."

In its opinion herein, the First District Court in referring to the opinion of the Third District Court in this case on the first appeal (*Williams v. San Francisco,* 24 Cal. App. (2d) 630) said (R. 129, 130):

> "Whether or not that be true, we are in accord with the construction of the decision rendered in the California Oregon Power case by the District Court of Appeal, and adopt as our own the following portion thereof:
>
> 'In construing the application of the Desert Land Act to water rights of every nature incident to lands which were thereafter conveyed, the Supreme Court said that subject to prior vested water rights acquired by appropriation:
>
> ' "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately * * * The fair construction of the pro-

vision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public *under the laws of the states and territories named* * * * The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation.* It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that *the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customers, laws, and judicial decisions of the state of their location.*" '

'It may not be contended that Congress has not delegated and conferred upon the legislatures of the various so-called arid states the power to fix and determine the grantee's water rights incident to land conveyed by the government under the Desert Land Act. In the sentence following the preceding quotation, the court said:

' "If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still *the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted.*" '

'There can be no question from the preceding quoted language of the Supreme Court but that

> the water rights of a grantee of arid land from the government carries with it the absolute authority of the state in which it is located to fix and determine the extent thereof by appropriate legislation, or by acknowledgment of rules and customs with respect thereto.' "

The excerpt quoted above from the opinion of this Court in the *Cal. Ore. Power* case is from page 162 of the opinion. It is noteworthy that the First District Court omitted the following part of the quoted paragraph:

> "The words that the water of all sources of water supply upon the public lands and not navigable *'shall remain and be held free for the appropriation and use of the public'* are not susceptible of any other construction."

The omitted sentence illustrates the erroneous attitude of the First District Court. *It did not attempt to interpret the Desert Land Act.* It tried to interpret the opinion of this Court only, and gave to the expression, *"such title * * * to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location"*, a meaning which would *nullify* the decision of this Court—which was that the plaintiff in the *Cal. Ore. Power* case had no riparian rights. It will be noted that the quoted expression *does not appear* in the Desert Land Act, but the words quoted by this Court in the sentence which the First District Court *omitted* from its quotation of the paragraph from page 162 *are* the words of the Desert Land Act.

As stated by this Court in the part of the paragraph of its opinion quoted by the First District Court, *"The only rule spoken of is that of appropriation"*.

Had the First District Court been more observant regarding the language of the Desert Land Act which was under review, it would not have fallen into its error in the interpretation of the language of this Court.

No one can study the part First of the opinion of this Court in the *Cal. Ore. Power* case without being impressed with the fact that it is an outstanding eulogy of the doctrine of prior appropriation. The early congressional Acts recognizing the use of water on the public domain are cited and appropriate excerpts are quoted from cases interpreting the same.

The point is emphasized that Congress by the reservation of water in the Desert Land Act aimed to avoid in the future the disastrous effect of the common-law doctrine of riparian rights in retarding the diversion of water necessary to reclaim the public domain.

At pages 154-155 of the opinion, Section 9 of the Act of 1866 is quoted. That was the act which first used the expression: "Whenever, *by priority of possession,* rights to the use of water * * * have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts * * *"

Wherever the above expression, or the controlling part thereof, is used in the opinion of this Court in

the *Cal. Ore. Power* case *it necessarily refers exclusively to the doctrine of prior appropriation.*

At pages 158-160 of its opinion, this Court comments upon certain of its earlier opinions dealing with the Acts of 1866 and 1877. At page 159, it quotes from its opinion in *United States v. Rio Grande D. & I. Co.,* 174 U. S. 690, 706, with reference to the Acts of 1866 and 1877 as follows:

> "Congress recognized and assented to the appropriation of water *in contravention of the common law rule as to continuous flow.*"

Continuing its comments on earlier decisions, this Court said (p. 160):

> "In *Gutierres v. Albuquerque Land & Irr. Co.,* 188 U. S. 545, 23 S. Ct. 338, 47 L. Ed. 588, it was held that the acts of 1866 and 1877 recognized, in respect of the public domain, *the validity of the local customs, laws, and decisions of the territories as well as of the states in respect of the appropriation of waters,* and granted the right to appropriate such quantity as might be necessarily used to irrigate and reclaim desert land, and the right of the public to use the surplus for irrigation, mining, and manufacturing purposes subject to existing rights."

Earlier in the opinion after quoting from the Acts of 1866 and 1872, this Court said (p. 155):

> "The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, *and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and*

> *judicial decisions of the arid land states,* as the test and measure of private rights in and to the non-navigable waters on the public domain. *Jones v. Adams,* 19 Nev. 78, 86, 6 P. 442, 3 Am. St. Rep. 788; *Jacob v. Lorenz,* 98 Cal. 332, 335, 336, 33 P. 119."

We do not hesitate to state that in California cases the expression "recognized and acknowledged by local customs, laws and the decisions of Courts", as related to water rights, has been used exclusively with reference to the rule of prior appropriation. As stated by this Court that rule grew out of the occupancy of the public domain during the early mining period. It was there and then that "local customs" were established to define mining and water rights. Later the "local customs" were reflected in Court decisions and finally were adopted as state statutes. The California Civil Code Sections 1410 to 1422 were evolved in that way. Those sections were adopted in 1872 to govern the appropriation of water in California.

V.

THE FIRST DISTRICT COURT HAS FAILED TO DISTINGUISH BETWEEN THE UNITED STATES AS A SOVEREIGN AND AS A LANDOWNER. IN LEGISLATING FOR THE DISPOSAL OF ITS LANDS, AS IN THE DESERT LAND ACT, THE UNITED STATES ACTS AS LANDOWNER ONLY. IN THE PART "SECOND" OF ITS OPINION IN THE CAL. ORE. POWER CASE (295 U. S. 163, 164) THIS COURT POINTS THE ERROR OF THE LOWER COURT IN HOLDING THAT THE INTERPRETATION OF THE DESERT LAND ACT IN HOUGH v. PORTER BY THE OREGON SUPREME COURT IS INCONSISTENT WITH THE GENERAL DOCTRINE THAT EACH STATE MAY DETERMINE FOR ITSELF THE WATER RIGHT DOCTRINES TO BE FOLLOWED. (73 F. (2d) 562.) THE FIRST DISTRICT COURT IS IN ERROR IN FOLLOWING THE LOWER FEDERAL COURT. THE PETITIONER BEFORE THIS COURT IN THE CAL. ORE. POWER CASE UNSUCCESSFULLY PRESSED THE SAME ERRONEOUS ARGUMENT.

In refusing to follow the Oregon Supreme Court in *Hough v. Porter,* 51 Or. 318, 98 P. 1083, the Circuit Court of Appeals in the *Cal. Ore. Power* case said (73 F. (2d) 562):

> "Furthermore, the interpretation of the Desert Land Act in *Hough v. Porter is inconsistent* with the general doctrine that each state 'may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state.' *State of Kansas v. Colorado,* 206 U. S. 46, 94, 27 S. Ct. 655, 666, 51 L. Ed. 956 (1907)."

The lower federal Court erroneously so ruled in the above excerpt *as it failed to distinguish between the United States as sovereign and as landowner.* To

point the error of such view this Court, after finishing its discussion as to the effect of the Desert Land Act and concluding that plaintiff had *no* riparian right, added part "Second" to its opinion, the first paragraph of which is as follows (295 U. S. 163, 164):

> "Second. Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' *State of Kansas v. Colorado,* 206 U. S. 46, 94, 27 S. Ct. 655, 666, 51 L. Ed. 956, the full power of choice must remain with the state. *The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation.* See *State of Wyoming v. Colorado,* 259 U. S. 419, 465, 42 S. Ct. 552, 66 L. Ed. 999."

The First District Court, after quoting the first two sentences of the above excerpt, says (in quoting

with approval from the opinion of the Third District Court in 24 C. A. [2d] 638) (R. 130, 131):

> "It is therefore not true, as the respondent (petitioner herein) contends, that the appellants (respondents herein) in this case possess no water rights incident to their lands merely because their titles were acquired from the government by patents issued subsequent to the adoption of the Desert Land Act. As the supreme court has definitely held, *they may be entitled to any water rights which have been recognized and fixed 'by the customs, laws and judicial decisions of the state' of California.*"

We repeat that the theory of the First District Court would *nullify* the decision of this Court as, for the purposes of the decision, riparian rights were considered as *recognized* in Oregon.

The First District Court has failed to quote and to consider the last two sentences of the paragraph quoted above from part "Second" of this Court's opinion. For emphasis, we repeat them as follows:

> "*The Desert Land Act* **does not bind or purport to bind** *the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the* **state and local doctrines of appropriation,** *and seeks to remove what otherwise might be* **an impediment** *to its full and successful operation.* See *State of Wyoming v. Colorado,* 259 U. S. 419, 465, 42 S. Ct. 552, 66 L. Ed. 999."

It is certain that the word "impediment" in the last sentence of the above excerpt refers to the common-law rule of riparian rights.

To illustrate the insistence of this Court in ruling that by the Desert Land Act Congress meant *to sever and withhold the riparian rights* from all lands patented after the date of the act, we quote the following excerpts from the opinion in the *Cal. Ore. Power* case:

> "If the acts of 1866 and 1870 did not constitute *an entire abandonment of the common-law rule* of running waters in so far as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result." (p. 155.)
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> "In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed. By its terms, not only all surplus water over and above such as might be appropriated and used by the desert land entrymen, but 'the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable' were to remain 'free for the appropriation and use of the public for irrigation, mining and manufacturing purposes'. *If this language is to be given its natural meaning, and we see no reason why it should not,* **it effected a severance of all waters upon the public domain,** *not theretofore appropriated, from the land itself. From that premise, it follows that a patent issued thereafter for lands in a desert land state or territory,* **under any of the land laws of the United States,** *carried with it, of its own force,*

no common-law right *to the water flowing through or bordering upon the lands conveyed."* (p. 158.)

* * * * * * *

"As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or **to dispose of them separately.** *Howell v. Johnson* (C. C.), 89 F. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future *the land should be patented* **separately;** and that *all non-navigable waters thereon should be* **reserved** for the use of the public under the laws of the states and territories named." (p. 162.)

* * * * * * *

"That body thoroughly understood that an enforcement of *the common-law rule, by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain* into small holdings and effecting their distribution among innumerable settlers." (p. 157.)

* * * * * * *

"Necessarily, that involved the complete **subordination** *of the common-law doctrine of riparian rights to that of appropriation."* (p. 158.)

There is certainly nothing in the Desert Land Act indicating that Congress was attempting to fasten any water right doctrine upon a state. That it cannot do. *In adopting that Act, it was not acting as lawmaker in its sovereign capacity, but simply as landowner.* As landowner it has the same right as any private landowner to dispose of its lands as it sees fit.

So far as California is concerned the settled rule is that riparian rights may be granted separately from the land and thereby definitely severed therefrom.

Lux v. Haggin, 69 Cal. 255, 368, 10 P. 674, 739;
Gould v. Stafford, 91 Cal. 146, 155, 27 P. 543.

This whole question is excellently covered by the Oregon Supreme Court in *Hough v. Porter,* 98 P. 1081, 1091, 1092. In answering a like objection presented to its interpretation of the Desert Land Act, the Court said:

> "The right of the government to dispose of its public lands, and to deal with all rights incident thereto, in such a manner as it may deem best, has long been fully established and recognized by all decisions upon the subject. *True, it cannot by legislation determine for any state, after its admission, what the local laws relative to riparian rights shall be* (*United States v. Rio Grande Irr. Co.,* 174 U. S. 690, 703, 19 Sup. Ct. 770, 43 L. Ed. 1136); but the general government, in dealing with its public lands, may provide for their transfer *as might any other landed proprietor,* and make such reservations therefrom by grant, dedication, or otherwise as it may see fit. Riparian rights may become the subject of a grant or dedication, and may be severed from the soil."

Further recognition of the difference between the United States as *sovereign* and as *landowner* is given in *Palmer v. Railroad Comm.,* 167 Cal. 163, 138 P. 997, wherein it is said (pp. 168, 173, 174):

> "The United States, with respect to the lands which it owns in this state, is a riparian pro-

prietor as to the streams running through such lands. It is only by virtue of that fact that it has any right or power of disposition over the waters thereof. *And its right and power in that respect is no greater and no less than that of any other riparian proprietor.*" (p. 168.)

* * * * * * *

"Hence, the right to the water of flowing streams in this state, prior to any sale or disposition of lands by the state or by the United States, was vested in the state or in the United States, *not in their respective governmental capacities as sovereign and for the common use of the people, but as riparian owners in their respective capacities as landed proprietors.* These rights were and still are strictly proprietary and in their nature private." (pp. 173, 174.)

It is clearly apparent that the *only* purpose of part "Second" of the opinion of this Court in the *Cal. Ore. Power* case is to point the error of the lower Court in holding that the decision in *Hough v. Porter is inconsistent* with the doctrine that each state may determine its own water right policy. The lower Court specifically held that the homestead patent of 1885, under which plaintiff claimed, carried with it the common-law right to have the stream continue to flow in its accustomed channel, without substantial diminution. This Court definitely held that said patent carried with it *no common-law water rights at all.* Passing on the error of the lower Court, this Court held that the Desert Land Act does *not bind or purport to bind* the states to any policy, and emphasized the point that the

Act recognizes and gives sanction to the state and local *doctrine of appropriation* and seeks to remove what otherwise might be an impediment to the full and successful operation of that doctrine.

The First District Court fell into the same error as the lower federal Court.

The petitioner before this Court in the *Cal. Ore. Power* case argued that the doctrine of riparian rights was still the paramount doctrine in Oregon and that to construe the 1909 Water Code as subordinating that doctrine would be a clear violation of the Fourteenth Amendment. That petitioner further argued (295 U. S. 147, 148) as follows:

> "The decision in *Hough v. Porter,* 51 Ore. 318, that lands patented after the date of the Desert Land Act are without riparian rights, because the Act severed such rights from the public lands, is unsound. Congress did not in that enactment intend to interfere with the riparian doctrine as applied in the States. Cf. *Scott v. Latting,* 227 U. S. 229; *United States v. Rio Grande Dam & Irr. Co.,* 174 U. S. 690.
>
> * * * * * * *
>
> "It has been the constant policy of the Government of the United States to allow the citizens of the various States to work out their own system of law with relation to water rights, without intervention or adverse legislation by the Federal Government. *United States v. Central Stockholders,* 52 Fed. (2d) 322."

It is apparent from the above excerpts that petitioner in the *Cal. Ore. Power* case took the same po-

sition as to the interpretation of the Desert Land Act as does the First District Court herein. In showing the error of that position this Court *ruled* that the Desert Land Act compelled the conclusion that lands patented after the date thereof are without riparian rights, and *refused to rule* upon the other point presented by petitioner that to construe the 1909 Oregon Water Code as did the lower federal Court was to violate the provisions of the Fourteenth Amendment.

VI.

THE ERROR OF THE FIRST DISTRICT COURT IN INTERPRETING PART "SECOND" OF THE OPINION OF THIS COURT IN THE CAL. ORE. POWER CASE IS EMPHASIZED BY THE FACT THAT AT THE DATE OF THE PASSAGE OF THE DESERT LAND ACT NO WESTERN STATE OR TERRITORY HAD ABROGATED THE COMMON-LAW RULE OF RIPARIAN RIGHTS. TO HOLD, THEREFORE, THAT THE RESERVATION OF WATER IN SAID ACT IS NOT EFFECTIVE IN RIPARIAN RIGHT STATES AMOUNTS TO AN ABSOLUTE NULLIFICATION OF SAID RESERVATION OF WATER BY CONGRESS.

As stated in the opinion of this Court in the *Cal. Ore. Power* case (p. 156), the Desert Land Act "allows the entry and reclamation of desert lands within the states of California, Oregon, and Nevada (to which Colorado was later added), and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota (later to become the states of North and South Dakota)". Colorado was not added until March 3, 1891. (43 U. S. C. A., sec. 323.)

At the date of the passage of the Desert Land Act, no one of the states or territories named in the Act had abrogated the common-law rule of riparian rights.

The status of the riparian doctrine in the western states is given in *Peabody v. Vallejo,* 2 Cal. (2d) 351, 365, 366, 40 P. (2d) 486, as follows:

> "Of the seventeen western states, generally referred to as the irrigation states, nine now recognize the modified doctrine of riparian rights and eight have entirely abrogated the doctrine of riparian rights and recognize only the doctrine of appropriation. The nine are North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Washington, *Oregon* and California; and the eight are Montana, Idaho, Wyoming, Nevada, Utah, Colorado, Arizona and New Mexico. (Wiel on Water Rights, secs. 117, 118.) Mr. Wiel at the time properly listed Montana as a riparian state, but in 1921 it was held in *Mettler v. Ames Realty Co.,* 61 Mont. 152 (201 Pac. 702), that the doctrine of riparian rights was abrogated and that the doctrine of prior appropriation obtained exclusively in that state."

The history of the status of the riparian doctrine in Nevada is especially noteworthy. In 1872, the Supreme Court of Nevada in *Van Sickle v. Haines,* 7 Nev. 249, held that the doctrine of riparian rights was the paramount doctrine in that state. The Court based its decision therein on a Nevada statute making the common law of England the rule of decision in all Nevada Courts. It was not until 1885 that the

Nevada Supreme Court in *Jones v. Adams,* 19 Nev. 78, 6 P. 442, overruled its earlier decision in the *Van Sickle* case. It is clear, therefore, that on March 3, 1877, the paramount water right doctrine in Nevada was that of riparian rights.

In 1 Wiel, Water Rights, 141, 142, a very carefully prepared list of the cases in which the riparian right has been abrogated is given in a separate footnote for each of the seven states, Arizona, Colorado, Idaho, New Mexico, Nevada, Utah and Wyoming. Montana is not there listed as Mr. Wiel then believed (1911) that Montana was a riparian right state.

A search of the cases cited by Mr. Wiel shows that the first state or territory to abrogate the riparian doctrine was Colorado in *Coffin v. Left Hand Ditch Co.,* 6 Colo. 443, decided in 1882.

It is apparent, therefore, that on March 3, 1877, *the riparian doctrine was the paramount doctrine in all of the western states and territories to which the provisions of the Desert Land Act applied.*

The conclusion is irresistible, therefore, that Congress meant the reservation of water provided in the Desert Land Act to apply *"in contravention of the common-law doctrine"* to all public lands in all of the states and territories included in the Act—among which are California and Oregon.

To hold that the reservation of water rights contained in the Desert Land Act is not effective as to lands patented thereafter in a state recognizing riparian rights, amounts to an absolute nullification of

said reservation of water by Congress. It certainly cannot be argued successfully that the decision of this Court in the *Cal. Ore. Power* case nullifies any provision of the Desert Land Act. It is clear, therefore, that the First District Court has misinterpreted the opinion of this Court.

VII.

THE DISTRICT COURT IS IN ERROR IN HOLDING THAT IT IS IMMATERIAL, SO FAR AS THIS CASE IS CONCERNED, WHAT LAWS OR LEGAL DOCTRINES HAVE BEEN FOLLOWED IN OREGON. ORIGINALLY THE RIPARIAN DOCTRINE WAS SO DOMINANT IN OREGON THAT IT HAD NO STATUTE AUTHORIZING THE APPROPRIATION OF WATER UNTIL 1891. IN JANUARY, 1909, THE OREGON SUPREME COURT IN HOUGH v. PORTER, 98 P. 1083, HELD IN INTERPRETING THE DESERT LAND ACT THAT NO LAND PATENTED AFTER MARCH 3, 1877 (THE DATE OF THE ACT), POSSESSES RIPARIAN RIGHTS EXCEPT FOR DOMESTIC PURPOSES.

In referring to the water-right doctrines recognized in Oregon, the First District Court said (56 A. C. A. 421, 427, 133 P. (2d) 70, 73) (R. 131):

> "And as pointed out, California, by law, judicial decision and custom has recognized riparian rights to the beneficial use of the waters upon lands in this state adjacent to rivers and streams. It would seem to be quite immaterial, therefore, so far as this case is concerned, what laws or legal doctrines have been followed in the state of Oregon."

On the contrary, the question of the recognition of the riparian doctrine in Oregon is so *material* as to be

controlling. As repeatedly stated herein, both the lower Court and this Court in the *Cal. Ore. Power* case considered the riparian doctrine in force in Oregon when the lands of plaintiff were patented. The lower Court held that the 1909 Oregon Water Code abrogated the riparian doctrine, but this Court *refused* to pass on that point.

So dominant was the riparian doctrine in Oregon that it had no statute authorizing the appropriation of water until February 18, 1891. In the Oregon case, *Simmons v. Winters,* 21 Or. 35, 27 P. 7, 9, it is said:

> "2. In this state the doctrine of the right to water by prior appropriation for mining and irrigating lands has not been adopted or applied, except as the parties have acquired their rights under the act of congress of 1866. *Nor has there been any legislation by the state upon the subject.* By the act of congress, the right to water by prior appropriation from the streams upon the public domain was recognized and established."

The opinion in the *Simmons* case is dated June 24, 1891, so that Oregon's first act governing the appropriation of water was passed while the case was before the Court and probably after briefs had been submitted.

In 2 *Wiel, Water Rights,* 1492, it is said concerning riparian rights in Oregon:

> "*Concerning Riparian Rights.* Until the decision in *Hough v. Porter* (1908), 51 Or. 318, 98 Pac. 1083, the Oregon laws upheld the common law of riparian rights for private land *upon the*

> *same terms as in California,* but in that case it is held, in reliance upon the Desert Land Act of Congress of 1877, that no land patented since 1877 can have riparian rights except such a flow as may be necessary for domestic use upon the land."

In *Hough v. Porter,* a long list of Oregon cases holding that the riparian doctrine is paramount in Oregon is given at page 1099 (98 Pac.). After *Hough v. Porter,* riparian rights were still recognized in the same way as in California for all lands patented *prior to March 3, 1877.* An excellent example of this recognition is *East Oregon Land Co. v. Willow River L. & I. Co.,* 201 F. 203. That case was decided in November, 1912, three years after *Hough v. Porter,* but the Court therein cited and followed the extreme riparian rule established in *Miller & Lux v. Madera Canal Co.,* 155 Cal. 59, 99 P. 502. The lands of plaintiff in that Oregon case were not affected by *Hough v. Porter* as they had been conveyed to the State of Oregon under the Military Road Grant Acts of February 25, 1867, and June 18, 1874—long prior to the effective date of the Desert Land Act, March 3, 1877.

In 1924, the Oregon Supreme Court, in construing the 1909 Water Code, in *In re Hood River,* 114 Or. 112, 227 P. 1065, denied to a riparian power company the common-law right to a "continuous flow" of Hood River as against prior appropriators. The opinion in that case is both long and involved. In addition to the main opinion two justices concurred in special opinions, and three justices dissented in special opinions. In his concurring opinion, Mr. Justice Coshow said:

> "The able and exhaustive opinion of Mr. Justice McCourt is accepted by the writer as the correct statement of the doctrine of riparian rights as the same existed in the state prior to 1909, when the Water Code was adopted."

Mr. Justice McCourt was one of the three dissenting justices. (227 Pac. 1096.) His opinion clearly shows that the doctrine of riparian rights was the dominant water-right doctrine in Oregon prior to the adoption of the Water Code. It is noteworthy that the *Hood River* case deals with lands which had been acquired *prior* to March 3, 1877, and for that reason the case did not fall within the rule established in *Hough v. Porter* (227 P. 1097).

We present the above statement showing the recognition of the riparian doctrine in Oregon in order to emphasize the error of the First District Court. As repeatedly stated herein, this Court and the lower Court in the *Cal. Ore. Power* case considered the fact to be that the riparian doctrine was the *dominant* water-right doctrine in Oregon. The lower Court held that the riparian doctrine was abrogated by the 1909 Oregon Water Code, but this Court *refused* to pass on that point and rested its decision that plaintiff had *no* riparian right *exclusively* on its interpretation of the Desert Land Act. The First District Court is indulging in an unwarranted reflection upon this Court in implying that this Court should spend so much time and space in considering a right which did *not* exist.

VIII.

THE INTERPRETATION OF A CONGRESSIONAL STATUTE RESPECTING THE DISPOSITION OF PUBLIC LANDS DOES NOT DEPEND UPON STATE LAWS. AS OWNER OF THE PUBLIC DOMAIN, THE UNITED STATES POSSESSES THE POWER TO DISPOSE OF LAND AND WATER THEREON TOGETHER, OR TO DISPOSE OF THEM SEPARATELY. NO STATE HAS THE RIGHT TO INTERFERE WITH THE EXERCISE OF THAT POWER BY THE UNITED STATES. THE EFFECT OF THE OPINION OF THE FIRST DISTRICT COURT HEREIN IS TO DENY THE RIGHT OF THE UNITED STATES TO EXERCISE THAT POWER.

In the *Cal. Ore. Power* case it is said (295 U. S. 162):

> "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell v. Johnson* (C. C.), 89 F. 556, 558."

In the case, *Howell v. Johnson,* cited by this Court, the plaintiff, a citizen of Wyoming, sought to enjoin plaintiffs, all citizens of Montana, from diverting the waters of Sage Creek, an interstate stream. The case is of particular importance in its discussion of the right of the United States to dispose of its public lands as it deems proper. It is therein said (89 F. 558, 559):

> "* * * *The rights of the plaintiff do not, therefore, rest upon the laws of Wyoming, but upon the laws of congress.*
>
> The legislative enactment of Wyoming was only a condition which brought the law of congress into force. The national government is the proprietor and owner of all the land in Wyoming and

Montana which it has not sold or granted to some one competent to take and hold the same. *Being the owner of these lands, it has the power to sell or dispose of any estate therein or any part thereof.* The water in an innavigable stream flowing over the public domain is a part thereof, and *the national government can sell or grant the same,* or the use thereof, *separate from the rest of the estate,* under such conditions as may seem to it proper.

* * * * * * *

The federal government is not restrained in the disposal of its lands by state laws or state lines. Its laws upon this subject apply to the lands in one state as well as another. It has made grants of land extending through several states. *The state governments cannot restrict it in the primary disposal of its lands.* If it may sell and dispose of its land as it may deem proper, there is no reason why it may not sell a part thereof as an incident thereto, such as the use of water flowing over the same. *That it has the same right as any real-estate proprietor would be self-evident.* It is apparent, then, according to the allegations of the bill, that plaintiff acquired rights by appropriation in Sage creek to which all who have acquired land upon the same, or water rights therein, subsequent to his appropriation, must be subordinate. His rights have the sanction of the national government."

The statute under consideration in *Howell v. Johnson* was the Act of 1866. That Act *subordinated* the riparian rights of public lands to appropriations of water made, in accordance with local customs, laws

and the decisions of Courts, prior to the entry of the riparian lands. It has never been suggested (so far as reported cases are concerned) that the Act of 1866 did not apply in states, like California, recognizing the riparian doctrine. The great virtue of the Act is that it subordinates the riparian rights of public lands to prior appropriations—a condition which could only be present in states recognizing the riparian doctrine.

In *Duckworth v. Watsonville etc. Co.,* 170 Cal. 425, 432, 150 P. 58, the California Supreme Court, in refuting the theory that an appropriation of water, under the Civil Code, constitutes a grant by the state of a right to take the water appropriated, said:

> "These decisions show that while an appropriation or diversion made upon lands of the United States gives the appropriator or diverter a right to the water as against the United States it does so solely because, by the act of Congress of July 16, 1866 (14 U. S. Stats. 253), the United States declared that such diversion, *if recognized by local laws,* should be effectual to confer upon the diverter the riparian rights in the stream pertaining to the land of the United States abutting thereon, that it gives no right as against other landowners, that this does not take place upon the theory that the water is held by the United States for public use, but because, *as proprietor of the land, the United States by that act, granted a part of its property in its land to such diverter.*"

It is clear from the decisions in *Howell v. Johnson* and the *Duckworth* case that the United States in disposing of its public lands acts in a *proprietary* capacity only. The only difference between the effect of the Act

of 1866 and that of the Desert Land Act is that, under the former, appropriations of water are superior to the riparian rights of public lands *unentered* at the date of the appropriation, while under the latter, the riparian rights of the public lands are *reserved* by the United States for the benefit of *future* appropriators. Each Act deals with the United States in its capacity as *landowner only*. As stated in the excerpt from the *Cal. Ore. Power* case quoted at the beginning of this subdivision: "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or *to dispose of them separately*". The effect of the opinion of the First District Court herein is to deny to the United States, *as landowner,* the right to dispose of its lands "under such conditions as may seem to it proper".

Neither the Act of 1866 nor the Desert Land Act is dependent for its proper interpretation upon the laws of a particular state. Each act establishes a policy for the public domain in a number of states. When this Supreme Court interprets either act for lands in a state like Oregon, the same interpretation necessarily applies in any other state, like California.

IX.

THE PART OF THE TUOLUMNE RIVER INVOLVED HEREIN IS NOT NAVIGABLE.

The question of the navigability of the Tuolumne River was not present in this case in the state Courts.

The entire case of plaintiffs (respondents here) rests upon the fact that the river is *not* navigable. In California, the state is the owner of all land below the water of a navigable lake or stream, and it is only where land borders upon a non-navigable non-tidal stream that the owner takes to the middle of the stream.

California Civil Code, §§670, 830.

The lands of plaintiffs are described in Exhibit "A" attached to the complaint. Therein, one parcel of the lands of Dan E. Williams and Lydia C. Williams is described as "lying north of the *center line* of the Tuolumne River". (R. 12.) In the findings of fact, certain land of John F. Munn and Mary C. Munn is described as "that portion of Lot 6, Section 18 lying southerly of the *center line* and on the southerly border of the Tuolumne River". (R. 91.)

Plaintiffs' Exhibit 1 is made part of the judgment herein. (R. 110.) It is set forth in the transcript of record following page 102. It is a plat showing the lands of plaintiffs, the Tuolumne River, and the dam and weir sites for the several power projects proposed by plaintiffs. The exhibit shows that many of the mining claims and section subdivisions belonging to plaintiffs include the bed of the river. As shown above, the bed of the river can be considered as private property only where the river is non-navigable and non-tidal.

In *1854,* the Legislature of California declared the head of navigation on the Tuolumne River "to be at

Dickinson's Ferry". (1854 California Stat. p. 203.) That declaration has been preserved in Section 105 of the Harbors and Navigation Code of California as follows:

> "Section 105. The following streams and waters are also navigable and are public ways:
>
> * * * * * * *
>
> Tuolumne River, between its mouth and *Dickinson's Ferry."*

As this Court is probably unfamiliar with the rivers of California, in order to make certain that there can be no thought in this case that the Tuolumne River is navigable at the lands of respondents, we have filed with the "original" of this petition and brief a certified copy of the township plat of survey of Township 3 South, Range 12 East of Mount Diablo Meridian, which was filed in the Surveyor General's offices in San Francisco, California, on December 30, 1854. It shows *"Dickinson's Ferry"* in the north half of the northeast quarter of Section 34. Paragraphs 1 to 12, inclusive, of the judgment of the trial Court herein show the lands of plaintiffs to lie within Township 1 South, Range 14 East and Township 1 South, Range 15 East, Mount Diablo Meridian. (R. 104-109.) (See also plat, Plaintiffs' Exhibit No. 1, following page 102 of the Transcript of Record.) As *Dickinson's Ferry* lies in Range 12 East and as the river runs from the east to the west, it is clear that the lands of plaintiffs are many miles easterly of, and upstream from, *Dickinson's Ferry.*

In California, the accepted rule is that rivers are to be considered as non-navigable above the head of navigation thereon as declared by statute.

American River Water Co. v. Amsden, 6 Cal. 443, 446;

Cardell v. Sacramento County, 79 Cal. 347, 349, 21 P. 763;

Donnelly v. United States, 228 U. S. 243, 262, 263, 57 L. Ed. 820, 828.

As the lands of respondents herein are upstream from the head of navigation declared by statute, that part of Tuolumne River here involved must be considered as non-navigable by this Court.

X.

CONCLUSION.

The opinion of the First District Court rests on the mistaken conception that since this Court held in the *Cal. Ore. Power* case that each state has the right to declare the character of interests in waters to which grantees of the Federal domain are entitled, and since California recognizes the riparian doctrine as well as the doctrine of appropriation, per consequence the Desert Land Act is to be construed in California as though it did not create a severance of the water rights from the land and hence that subsequent grantees of portions of the public domain in California take title unaffected by the provisions of the Desert Land Act.

This argument is erroneous in two particulars: (1) The statute applied to the named western states and territories with entire uniformity—to Washington and to California no less than to Nevada and to Oregon—all of which, as we have shown hereinabove, were then committed to the riparian doctrine. If a severance was thereby worked in Oregon, under like facts it was also thereby worked in California. (2) California now and at all prior times has recognized the validity of such a severance. Moreover, when the riparian right has once been severed from the land, under the uniform decisions of this state, the land forever afterwards remains non-riparian. In reliance on this rule of property, hundreds of thousands of acres of lands once riparian to the rivers of California have by the deliberate intent of their owners been rendered non-riparian in order to facilitate their development under subdivision projects.*

Lux v. Haggin, 69 Cal. 255, 368, 10 P. 674, 739;
Gould v. Stafford, 91 Cal. 146, 155, 27 P. 543, 546.

The First District Court in its opinion denies to the United States of America the equal right to do that which the State of California accords to every other

*For instance, Miller & Lux owns, or did own, upwards of one hundred thousand acres of land riparian to the San Joaquin River. That land came down from Spanish grants or through swampland grants, so that the United States had no title to any part of such riparian land from a date long prior to March 3, 1877. Miller & Lux has adopted the sales policy of conveying its lands separately and *reserving the riparian rights therein.* These facts are found in Miller & Lux v. Madera Irrigation Dist., No. 25,729, Superior Court, in and for the County of Fresno, California, from which no appeal was taken.

similarly situated landowner. The opinion attempts to do this under the mistaken notion that this Court has held that the Desert Land Act does not work a severance of the riparian right of the United States from its public lands in California. The opinion cavalierly brushes aside as unimportant the fact that this Court held in the *Cal. Ore. Power* case that such a severance was made not only in Oregon (which was there assumed by this Court to be a riparian-right state), but by necessary result, also in the states of Washington and California, and that this Court in that opinion pointed to the error which the Court of California had indulged in its too narrow construction of the Desert Land Act in the *Worswick* case.

We submit that in the *Cal. Ore. Power* case this Court did not mean to say merely that the *Worswick* case was wrong when applied to Oregon or to Washington. We venture the assertion that this Court there held that the *Worswick* case was wrong in its interpretation of the Desert Land Act *as applied to California;* that *in California* as well as in Washington and in Oregon the Desert Land Act severed the riparian right from the public domain so that thereafter a grantee from the United States *in California* as well as elsewhere would acquire a title divested of all riparian water rights; and that the proprietor of the public domain in each and all of those states had by that Act made another disposition of its water rights.

The plaintiffs here have not succeeded to any of the interests of the United States in the waters of the

Tuolumne River here claimed by them because their patents by necessary implication incorporate the prior act and hence contain a clause which reserves to the grantor the waters of that river, which water rights the grantor has chosen to dedicate to other purposes. We repeat that such a reservation in a like deed of any other owner of riparian lands in California is, under the uniform decisions of the Courts of California, entirely valid and that such a deed renders the granted lands forever thereafter non-riparian, no matter that they physically border upon a watercourse.

It is a strange, almost a startling, circumstance of this case that the very decision of the Supreme Court of California disapproved of by this Court because of its too narrow interpretation of the Desert Land Act is a conclusive and unimpeachable authority for the proposition that in California the United States, as owner of riparian lands, may sever the riparian title and that, when it does so in California, the grantee of the bare land takes no riparian title. Such, however, is the case! In the decision in the *Worswick* case, not the slightest question was made of the validity and effectiveness of the reservation as applied to lands patented under the Desert Land Act after its enactment. Nor in *Cave v. Tyler,* 133 Cal. 566, 65 P. 1089, the authority upon which the Worswick decision rests, was there the slightest question made that under the Acts of 1866 and 1872 the grantee of lands thereafter patented by the United States took them with a riparian right subordinated to all

appropriations theretofore made on the public domain above such riparian lands. This conclusively demonstrates that the opinion of the First District Court here involved is based on an erroneous construction of the Desert Land Act and not upon its interpretation of any statute, custom or rule of decision peculiar to California.

For the reasons hereinabove set forth, we ask that the petition herein be granted.

Dated, San Francisco, California,
April 26, 1943.

Respectfully submitted,

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(Appendix Follows.)